Supreme Court, U.S.
FILED

No. 94-1021 NOV 17 1994

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In The

Supreme Court of the United States

October Term, 1994

RONALD WHITE and JODI WHITE,

Petitioners,

vs.

WILLIAM MOULDER, in his official capacity as Chief of Police of the City of Des Moines, Iowa; RONALD FOSTER, individually and in his official capacity as Police Officer of the City of Des Moines, Iowa; DAVID NOEL, individually and in his official capacity as Police Officer of the City of Des Moines, Iowa; CITY OF DES MOINES, IOWA; JAMES RAMEY, individually and in his official capacity as an Assistant Polk County Attorney,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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36 pp

QUESTIONS PRESENTED

I.

Whether a defendant who is acquitted is precluded from claiming damages based on a violation of his constitutional right to a fair trial.

II.

Whether a prosecutor is entitled to absolute prosecutorial immunity after he knowingly failed to produce exculpatory evidence in violation of a court order.

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The opinion of the United States District Court for the Southern District of Iowa is contained in Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit ("Eighth Circuit") was entered on July 14, 1994. On August 19, 1994, the Eighth Circuit denied a Petition for Rehearing and Suggestion for En Banc Review. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Certiorari review is appropriate because the case involves important questions of law which have not been, but should be settled by this Court. The Eight Circuit's decision directly conflicts with an analogous decision by the Ninth Circuit on the same matter.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any

criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall property be taken for public use, without just compensation.

2. 42 U.S.C. § 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioner, Ronald White, filed an action in the United States District Court for the Southern District of Iowa against Respondents Moulder, the City of Des Moines, Noel, Foster, Polk County and Ramey, alleging Moulder and the City of Des Moines violated his Fifth Amendment right to due process by terminating him. Petitioner additionally charged Polk County, Ramey, Foster and Noel with denying him a fair trial pursuant to 42 U.S.C. § 1983 by deliberately withholding exculpatory

evidence. Petitioner made State claims against all Respondents for intentional infliction of emotional distress.

Respondents filed Motions for Summary Judgment which were granted by Chief District Judge Charles R. Wolle.

The Court of Appeals affirmed: "after considering officer White's trial as a whole, we conclude Officer White has failed to show a constitutional violation because his trial was not fundamentally unfair," (App. p. A5), and "although the prosecutor's failure to respond to Officer White's Motion to Produce exculpatory evidence is inexcusable, this delay did not impair White's right to a fair trial." (App. p. A5).

FACTS RELEVANT TO REVIEW

On November 8, 1990, Petitioner Ronald White supervised the execution of a search warrant at the residence of a suspected drug dealer. Cash and lottery tickets were seized and photographed at the scene.

When the money and tickets were offered into evidence during the suspect's trial it was determined that a $100.00 bill and a winning lottery ticket were missing. On May 9, 1991, Petitioner White was charged with one (1) count of Theft in the Third Degree, in violation of Section 714.2(3) of the Code of Iowa, for allegedly stealing the missing bill and ticket. On June 25, 1994, prior to the commencement of his trial, Petitioner White filed a Motion to Produce. On August 29, 1991, Associate District Judge Patricia Houlihan ordered the prosecuting

attorney, Respondent Ramey, to produce any exculpatory evidence. Ramey failed to comply, instructing Respondent Foster to withhold field notes containing identifying information regarding the missing bill and ticket. The criminal trial against Petitioner Ronald White commenced September 9, 1991. During the trial, Respondent Ramey gave false sworn testimony regarding the serial numbers on a list of currency presented as evidence. The trial judge, Polk County District Judge Arthur E. Gamble, found that Ramey "knowingly, willfully, intentionally, and deliberately suppressed exculpatory evidence in direct violation of Judge Houlihan's Order." (App. p. A3). Petitioner White was acquitted on all charges on September 11, 1991.

REASONS FOR GRANTING THE WRIT

I. WHETHER A DEFENDANT WHO IS ACQUITTED IS PRECLUDED FROM CLAIMING DAMAGES BASED ON A VIOLATION OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL

The Eighth Circuit held Petitioner failed to show a constitutional violation as to his claim that he received a fundamentally unfair trial. (App. p. A5). The Court cites *Christman v. Hanrahan,* 500 F.2d 65 (7th Cir.), *cert. denied,* 419 U.S. 1050 (1974), to support its ruling that White did in fact receive a fundamentally fair trial. *Christman* held that an acquittal by a jury made the trial fundamentally fair. The court indicated it was not deciding generally the issue of whether a delayed disclosure may be sufficiently prejudicial to deprive an accused of a fair trial even if an

acquittal occurred. *Id.* at 68. The present case provides the exact scenario *Christman* contemplated in that Petitioner was forced to defend himself, here all of the way through a criminal trial, when Respondents knowingly concealed exculpatory evidence in direct violation of a Court order. The Defendant in *Christman* was relieved of the burden of having actually to defend himself at trial where, prior to trial, the charges against him were dismissed.

The Eighth Circuit incorrectly held Petitioner's complaint is essentially about the timing of the discovery of exculpatory evidence. The Court held that since Petitioner was acquitted, the trial court effectively prevented unfair jury influence by striking all the evidence concerning the seized currency and directing the jury to disregard the evidence. The very fact that Petitioner was required to defend himself at a trial seriously prejudiced him.[1]

The Eighth Circuit's decision directly conflicts with the holding in *Haupt v. Dillard,* 17 F.3d 285 (9th Cir. 1994). In *Haupt,* a criminal defendant was acquitted following a trial on murder and kidnapping charges. The Defendant then brought a § 1983 action alleging violation of his constitutional rights claiming he did not receive a fair trial. The United States District Court granted summary judgment holding that because Haupt was ultimately acquitted he received a fair trial. *Id.* at 287. On appeal, the Ninth Circuit held that Haupt's acquittal spoke only to

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[1] Petitioner was terminated from his job as a result of the execution of the search warrant that he supervised. He has suffered lost income and serious emotional trauma.

the amount of damages he suffered and that it was irrelevant to whether he had a cause of action. *Id.* Haupt held an acquittal does not erase all injury. *Id.* The facts in the instant case provide the exact situation contemplated by *Haupt.*

The Eighth Circuit's decision, if permitted to stand, creates an intolerable conflict between circuits. Prosecutors are permitted under the decision to ignore court orders to produce exculpatory evidence until trial, without penalty. The decision sets a precedent that is contrary to public policy and unconstitutional.

II. WHETHER A PROSECUTOR IS ENTITLED TO ABSOLUTE PROSECUTORIAL IMMUNITY AFTER HE KNOWINGLY FAILED TO PRODUCE EXCULPATORY EVIDENCE IN VIOLATION OF A COURT ORDER

The Court of Appeals concluded Respondent Ramey should be granted absolute prosecutorial immunity for his failure to produce exculpatory evidence to White, holding that his actions fell squarely within the parameters of protected prosecutorial functions set forth in *Imbler v. Pachtman,* 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). This holding is erroneous.

The Eighth Circuit failed to consider the Court's ruling in *Burns v. Reed,* ___ U.S. ___, 111 S.Ct. 1934, 114 L.ED.2d 547 (1991), holding that prosecutors are not entitled to absolute immunity for their actions in giving legal advice to the police. In the instant case, Respondent Ramey admitted he advised Respondent Officers Foster and Noel to keep their field notes to themselves and

chose not to produce this information to Petitioner or his counsel, even after a court order was issued.

The Court in *Buckley v. Fitzsimmons*, ___ U.S. ___, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993), noted:

> There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested. On the other hand, when a prosecutor performs the investigative functions normally performed by a detective or police officer, it is neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.

Id.

Respondent Ramey gave legal advice to the police officers involved and determined that certain evidence, field notes, should be left in their files. Additionally, he participated in the bill serialization itself, a function normally performed by a detective or police officer. *Burns* and *Buckley* prohibit prosecutors from giving legal advice and serving in an investigatory capacity. If any immunity is afforded Ramey, it can only be qualified immunity.

A recent Ninth Circuit case is particularly dispositive regarding the level of prosecutorial immunity to be granted when judicial deception is involved. In *Mendocino Environmental Center v. Mendocino County*, 14 F.3d 457 (9th Cir. 1994), the court denied immunity, after finding a knowingly false statement (or a statement made with reckless disregard for its truth) to the court includes a

subjective component and constitutes judicial deception. *Id.* at 462. In the present case, the state court, during Petitioner's criminal trial, held that Ramey "knowingly" withheld exculpatory evidence and as such, he should not be granted any immunity.

Mendocino cited extensively to *Branch v. Tunnell*, 937 F.2d 1382 (9th Cir. 1991) (*Branch I*), when discussing judicial deception claims, stating:

> *Branch I* controls our analysis of this claim. The heightened pleading standard is applicable to a claim of judicial deception: (A) Plaintiff's complaint must contain non-conclusory allegations that the defendant knowingly included false statements in the affidavit or did so with reckless disregard. That is, he must (1) "point out specifically the portion of the warrant affidavit that is claimed to be false," and (2) allege some facts tending to show that the defendant was aware or should have been aware of the falsity of those statements. (3) He must also allege that the false statements were "necessary to the finding of probable cause," but without the particularity required of his allegations regarding the defendant's state of mind.

Id., at 463.[2]

The Eighth Circuit appears to contradict itself, holding on one hand that Ramey's actions were inexcusable, yet also finding that an Ethics Committee sanction is a

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[2] The allegations in *Mendocino* were that portions of a search warrant affidavit were false and that officials knew that information concerning a car bombing, which was used to justify the search, was false.

satisfactory remedy. Respondent Ramey's discipline is of little import to Petitioner after having been required to expend large sums of money for attorney fees and costs, being terminated from his employment and having to suffer through a three-year court battle accompanied by the subsequent emotional trauma. It is correct Ramey's actions were inexcusable, and those inexcusable actions effectively cost Petitioner a fair trial, and regardless of his acquittal, caused serious injury to Petitioner. Accordingly, absolute immunity should not be granted.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that the Court grant his petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

Appendix A. Ronald White; Jodi White v. William Moulder, et. al., The opinion of the Eighth Circuit Court of Appeals..... A1

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 93-1307SI

Ronald White; Jodi White,

Appellants,

v.

William Moulder, in his official capacity as Chief of Police of the City of Des Moines; Ronald Foster, individually and in his official capacity as Police Officer of the City of Des Moines, IA; David Noel, individually and in his official capacity as Police Officer of the City of Des Moines, IA; Polk County, IA; City of Des Moines, IA; James Ramey, individually and in his official capacity as an Assistant Polk County Attorney,

Appellees.

Appeal from the United States District Court for the Southern District of Iowa.

Submitted: October 13, 1993
Filed: July 14, 1994

Before FAGG, Circuit Judge, HEANEY, Senior Circuit Judge, and MORRIS SHEPPARD ARNOLD, Circuit Judge.

FAGG, Circuit Judge.

Des Moines police officer Ronald White supervised a search in which police officers seized ten $100 bills and a winning $50 lottery ticket from suspects accused of drug charges. Police officers photographed the seized currency and lottery ticket at the scene of the search. When the prosecution offered the seized evidence at the suspects' state court trial, the lottery ticket was missing and the exhibit envelop contained nine $100 bills, a $50 bill, two $20 bills, and a $10 bill. Believing someone had tampered with the evidence, the trial judge asked Ronald Foster and David Noel, Des Moines police officers who had been present at the search, to count the currency and prepare an inventory by denomination and serial number. Because the trial judge allowed the suspects to plead guilty to lesser charges, the trial ended and the exhibit envelope containing the currency was returned to the police department along with the officers' inventory.

During an investigation into the missing evidence, a police identification technician found Foster and Noel's inventory mistakenly listed the $50 bill twice and neglected to list the smaller bills. An identification sergeant notified Foster, who put the information in his field notes and also told Noel and Polk County Attorney James Ramey about the mistakes. Ramey told Foster he did not need the information from Foster's field notes at that time. A police investigator also learned that Officer

White's spouse, Jodi White, cashed the missing lottery ticket the day after the search. About a month later, Ramey filed a state charge against Officer White for theft of the missing $100 bill and lottery ticket. The police department then dismissed Officer White from employment.

Before Officer White's trial on the theft charge, his attorney filed a motion to produce exculpatory evidence, but Ramey produced no evidence. At Officer White's trial, Ramey represented to the judge that the serial numbers on the currency in the exhibit envelope at the suspects' trial matched the serial numbers on the currency inventory prepared by Foster and Noel. After Ramey's representation proved untrue, Foster testified about telling Ramey of the mistakes in the inventory. Finding Ramey "knowingly, willfully, intentionally and deliberately suppressed exculpatory evidence," the trial judge struck the testimony about the currency seized in the search and instructed the jury to disregard all evidence about the currency. The jury acquitted Officer White. Officer White was later ordered reinstated on the policy force with back pay.

Officer White brought this action under 42 U.S.C. § 1983 against Des Moines Chief of Police William Moulder and the City of Des Moines, claiming his dismissal from the police force violated his right to due process. Officer White made additional § 1983 claims against Foster, Noel, Ramey, and Polk County, claiming violations of his right to a fair trial. Officer White and Jodi White also made state law claims against Moulder, the City of Des Moines, Foster, Noel, Ramey, and Polk County, for intentional infliction of emotional distress.

The district court granted summary judgment denying all the Whites' claims. The Whites appeal and we affirm.

Our review is limited to issues specifically raised and argued in the Whites' brief. *See United States v. Simmons*, 964 F.2d 763, 777 (8th Cir.), *cert. denied*, 113 S. Ct. 632 (1992). We thus do not address Officer White's claims against Moulder and the City of Des Moines, which the Whites did not brief. As for the issues raised in the Whites' brief, we may affirm the district court's grant of summary judgment on any ground supported by record. *See Cochenour v. Cochenour*, 888 F.2d 1244, 1246 (8th Cir. 1989).

On appeal, Officer White rests his § 1983 claims on his assertion that he was denied his constitutionally protected right to a fair trial when Foster, Noel, and Ramey failed to disclose the evidence of mistakes in the currency inventory to Officer White or his attorney before Officer White's state court trial started. Our review of Officer White's § 1983 claims necessarily begins with the threshold question of whether Officer White has been deprived of a constitutional right. *See Baker v. McCollan*, 443 U.S. 137, 140 (1979). After considering Officer White's trial as a whole, we conclude Officer White has failed to show a constitutional violation because his trial was not fundamentally unfair. *See Christman v. Hanrahan*, 500 F.2d 65, 67-68 (7th Cir.), *cert. denied*, 419 U.S. 1050 (1974). Because the mistakes in preparing the currency inventory were discovered during Officer White's trial, Officer White's complaint is essentially about the timing of discovery of evidence Officer White considers favorable to his defense. *See id.* at 68. The delayed disclosure did not prejudice Officer White's defense, however, because the

trial court effectively prevented unfair jury influence by striking all the evidence about the seized currency and directing the jury to disregard the evidence, and because Officer White was acquitted on theft of the $100 bill and the lottery ticket. Although the prosecutor's failure to respond to Officer White's motion to produce exculpatory evidence is inexcusable, the delay did not impair White's right to a fair trial.

Having concluded Officer White's failure to show a constitutional violation disposes of his § 1983 claims against Foster, Noel, Ramey, and Polk County, we turn to the Whites' other claims. The Whites contend Ramey and Polk County intentionally inflicted emotional distress on the Whites when Ramey failed to produce the evidence about the mistakes in the currency inventory after Officer White's motion to produce was granted. We need not consider the merits of the Whites' emotional distress claims against Ramey and Polk County because Ramey and Polk County are entitled to absolute prosecutorial immunity from civil liability under Iowa law. Iowa follows the *Imbler* functional approach to prosecutorial immunity, giving county attorneys and the counties that employ them absolute immunity for activities that are " 'intimately associated with the judicial phrase of the criminal process.' " *Hike v. Hall*, 427 N.W.2d 158, 159 (Iowa 1988) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)); *see Hanson v. Flores*, 486 N.W.2d 294, 295 (Iowa 1992) (immunity extends to county). Ramey's failure to produce evidence favorable to Officer White falls squarely within the protected prosecutorial function. *See Imbler*, 424 U.S. at 416, 430 (prosecutor absolutely immune from allegation he suppressed material evidence).

Even though Ramey is immune from tort liability to the Whites, Ramey is "amenab[le] to professional discipline by an association of his peers." *See Imbler*, 424 U.S. at 429; *Blanton v. Barrick*, 258 N.W.2d 306, 311 (Iowa 1977) (to same effect). Indeed, the Iowa Supreme Court suspended Ramey's license to practice law based on Ramey's conduct at Officer White's trial. *Committee on Professional Ethics & Conduct of the Iowa State Bar Ass'n v. Ramey*, 512 N.W.2d 569 (Iowa 1994).

The Whites also contend Foster and Noel intentionally inflicted emotional distress on the Whites by failing to disclose the evidence about the inventory mistakes directly to Officer White or his attorney. To prevail on these claims, the Whites must prove outrageous conduct. *See Cutler v. Klass, Whicher & Mishne*, 473 N.W.2d 178, 183 (Iowa 1991). Because Foster and Noel satisfied their obligations to disclose exculpatory evidence when they told prosecutor Ramey about the mistakes in their inventory, *see Walker v. City of New York*, 974 F.2d 293, 299 (2nd Cir. 1992), *cert. denied*, 113 S. Ct. 1387, *and cert. denied*, 113 S. Ct. 1412 (1993), we agree with the district court that Foster and Noel's failure to disclose the evidence to White or his attorney cannot be considered outrageous. The district court thus properly granted summary judgment for Foster and Noel on the Whites' emotional distress claims. *See Cutler*, 473 N.W.2d at 183 (court decides as a matter of law whether conduct may reasonably be considered outrageous).

Finally, the Whites challenge the district court's denial of the Whites' motion to amend their complaint to allege a conspiracy between Foster, Noel, Ramey, and

Moulder to deny Officer White equal protection by withholding the evidence about the mistakes in the currency inventory. We conclude the district court did not abuse its discretion in denying the Whites' motion because the undisputed facts show the Whites do not have colorable grounds for relief on their conspiracy theory. *See Williams v. Little Rock Mun. Water Works*, 21 F.3d 218, 224 (8th Cir. 1994). It is undisputed Foster and Noel told Ramey of the mistakes and put the information in their field notes and that neither the police officers nor Ramey told Moulder about the mistakes. Additionally, the Whites were guilty of undue delay in filing their motion eleven months after their complaint was filed and after the district court granted summary judgment for two defendants. The district court was not persuaded to grant the Whites' tardy motion to amend their complaint because the case from another federal circuit on which the Whites relied for raising their conspiracy theory was decided ten months before the Whites filed their motion to amend. *See id.*

Accordingly, we affirm the district court.

A true copy.

Attest: /s/ Michael E. Gans

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 93-1307SIDM

Ronald White; Jodi White, Appellants, v. William Moulder, in his official capacity as Chief of Police of the City of Des Moines; Ronald Foster, Individually and in his official capacity as Police Officer of the City of Des Moines, IA; David Noel, Individually and in his official capacity as Police Officer of the City of Des Moines, IA; Polk County, IA; City of Des Moines, IA; James Ramey, Individually and in his official capacity as an Assistant Polk County Attorney, Appellees.	*	Appeal from the United States District Court for the Southern District of Iowa. 4-92-CV-80006

JUDGMENT
(Filed Sept. 2, 1994)

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this

cause is affirmed in accordance with the opinion of this Court.

July 14, 1994

A true copy.

Attest: /s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

RONALD WHITE and JODI WHITE, Plaintiffs, vs. WILLIAM MOULDER, in his official capacity as Chief of Police of the City of Des Moines, RONALD FOSTER and DAVID NOEL, in their official capacities as Police Officers of the City of Des Moines and in their individual capacities, POLK COUNTY, the CITY OF DES MOINES, and JAMES RAMEY, in his official capacity as an Assistant Polk County Attorney and in his individual capacity, Defendants.	NO. 4-92-CV-80006 RULINGS (Filed Jan. 19, 1993)

Plaintiff Ronald White was tried and acquitted of criminal charges in Polk County District Court. He was terminated, but later reinstated, as a police officer for the city of Des Moines. He and his wife brought this action (filed January 8, 1992) seeking declaratory relief, injunctive relief, and compensatory damages to redress harms arising from his dismissal and prosecution.

In count 1 of the complaint, plaintiff Ronald White alleges that Polk County did not conduct a reasonable

background check prior to hiring James Ramey. In counts 2 and 3, plaintiff Ronald White alleges that the city of Des Moines and William Moulder terminated his employment without due process. In count 4, plaintiff Ronald White alleges that Ronald Foster and David Noel deliberately concealed exculpatory evidence and denied him a fair trial. In counts 5 and 6, invoking the court's supplemental jurisdiction, plaintiffs Ronald and Jodi White allege all defendants intentionally inflicted emotional distress upon them. In count 7, plaintiff Ronald White alleges that defendant James Ramey, an Assistant Polk County Attorney, gave police officers unreasonable legal advice, initiated and filed charges against White without adequate investigation, suppressed exculpatory evidence, and made false statements to the court during White's trial.

On July 21, 1992, this court granted summary judgment to defendants Polk County and James Ramey on counts 1, 7, and those parts of counts 5 and 6 that assert claims against them.

On October 20, 1992 the remaining defendants filed a motion for summary judgment. A hearing on the motion was held December 11, 1992.

On December 16, 1992, with the court's permission, plaintiffs' [sic] filed a supplemental brief in support of their resistance to defendants' motions for summary judgment. On that date plaintiffs also filed a motion to reconsider the earlier ruling for summary judgment in favor of defendants Polk County and James Ramey and a motion to amend their complaint to allege a conspiracy among all defendants to deprive plaintiff Ronald White of his constitutional right to equal protection. Defendants

Polk County and Ramey were not served with the plaintiffs' motions but have filed responses nonetheless. Defendants Moulder, Foster, Noel, and the city of Des Moines have also responded.

All pending motions are ready for ruling.

I. Motion for Summary Judgment: Summary judgment is appropriate only when a party has demonstrated that it is entitled to judgment as a matter of law, with no genuine issues of material fact remaining for trial. Fed. R. Civ. P. 56. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-51 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986). The court reviews the summary judgment record in a light most favorable to the party resisting summary judgment. But once a movant has demonstrated that an asserted claim lacks factual and legal support, summary judgment will be appropriate unless the non-moving party demonstrates that admissible evidence and a viable legal theory generate an issue for trial. *City of Mount Pleasant v. Associated Elec. Coop.*, 838 F.2d 268, 271-72 (8th Cir. 1988).

A. Counts 2 and 3. Counts 2 and 3 of plaintiffs' complaint allege that defendants city of Des Moines and William Moulder denied Ronald White's right to continued employment without procedural due process. Defendants Des Moines and Moulder are entitled to judgment as a matter of law on these counts.

Property interests are not defined by the Constitution; they are created and defined by independent sources. *Board of Regents of State Colleges v. Roth*, 408 U.S. 565, 577 (1972). Plaintiffs rely on *Bennett v. City of Redfield*

for their allegation that public employees have a property interest in continued employment. *Id.*, 446 N.W.2d 467, 472 (Iowa 1989) ("The civil service law, Iowa Code chapter 400, which creates a property interest in continued employment * * * ."). But the Iowa Supreme Court has consistently held that a police officer does not have a constitutional right to continued employment. *See Klein v. Civil Serv. Comm'n of Cedar Rapids*, 260 Iowa 1147, 1156, 152 N.W.2d 195, 200 (1967); *Sieg v. Civ. Serv. Comm'n of West Des Moines*, 342 N.W.2d 824, 829 (Iowa 1983); *City of Clinton v. Loeffelholz*, 448 N.W.2d 308, 311 (Iowa 1989). Ronald White has no property interest in continued employment as a police officer and no legal basis for this ground of his constitutional claim.

Nor has Ronald White established that he was denied a liberty interest without due process.

> To establish a liberty interest due process claim, the claimant must prove that the employer published false, stigmatizing charges in connection with the discharge which were denied by the claimant and which seriously damaged the claimant's employment opportunities or standing and associations in the community, all without notice and opportunity to be heard in a name clearing hearing requested by the claimant.
>
> Therefore, if the claimant has been afforded notice and opportunity to be heard in a name clearing hearing, no liberty interest claim arises.

Bennett v. City of Redfield, 446 N.W.2d at 471.

The summary judgment record clearly establishes that Ronald White had a name-clearing hearing. This

afforded him his notice and opportunity to be heard. Indeed, the Iowa Civil Service Commission reinstated Ronald White as a police officer. Defendants Des Moines and Moulder did not deprive him of a liberty interest. Defendants are entitled to summary judgment in their favor on counts 2 and 3.

B. Count 4. In count 4, plaintiff Ronald White asserts that defendants Ronald Foster and David Noel denied him a fair trial in failing to directly notify him of exculpatory evidence. Plaintiff concedes that Foster and Noel immediately informed Assistant County Attorney Ramey of the evidentiary discrepancies, and he also concedes that White obtained the information during his criminal trial.

The court must determine "whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert v. Gilley*, 500 U.S. ___, 111 S. Ct. 1789, 1793 (1991). Defendants argue that plaintiff cannot claim he was denied a fair trial when that trial resulted in his acquittal. The Eighth Circuit has not addressed this particular issue. However, the Seventh Circuit decided a case strikingly similar to the case at bar. *Christman v. Hanrahan*, 500 F.2d 65, 69 (7th Cir. 1974) (Christman was tried on murder charge, police and prosecution deliberately suppressed evidence favorable to Christman, evidence was disclosed before trial was concluded, Christman was acquitted). The *Christman* court noted that "the controlling principle [in *Brady v. Maryland*, 373 U.S. 83 (1963),] is not punishment of society for the prosecutor's misdeed 'but avoidance of an unfair trial to the accused.' " *Christman*, 500 F.2d at 68. The *Christman* court held that "[t]he failure to allege any facts disclosing an impairment of plaintiff's

right to a fair trial * * * is fatal to plaintiff's section 1983 claim." *Id.* at 69. This court is persuaded by the *Christman* reasoning. *See also Schiavone Construction Co. v. Merola*, 678 F. Supp. 64, 66 (S.D.N.Y. 1988) (no denial of a fair trial where plaintiff was acquitted), *aff'd*, 848 F.2d 43 (1st Cir.), *cert. denied*, 488 U.S. 855 (1988); *Schertz v. Wapuca County*, 683 F.Supp. 1551, 1573 (E.D. Wis. 1988) (no denial of fair trial where plaintiff acquitted at both trials); *Jones v. City of Chicago*, 639 F. Supp. 146, 151 (N.D. Ill. 1986) (no denial of fair trial where mistrial and charges dropped).

Defendants Foster and Noel are entitled to summary judgment on the constitutional claim alleged in count 4.

Defendants are also entitled to summary judgment in their favor on their qualified immunity defense. The allegations in count 4 are based on an assumption that police officers have a duty to produce evidence directly to a criminal defendant or the defendant's attorney. Plaintiff has not produced, nor has the court located, any authority in support of such a duty on the part of police officers. Ronald White had no "clearly established right" to have police officers, rather than the prosecution, deliver exculpatory evidence to him. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Therefore, defendants Ronald Foster and David Noel are immune from liability on count 4.

C. Counts 5 and 6. Plaintiff Ronald White has alleged in count 5, and plaintiff Jodi White has alleged in count 6, that the defendants are liable to each of them for intentional infliction of emotional distress. Defendants Moulder, Foster, Noel, and the city of Des Moines move for summary judgment on this claim; plaintiffs urge the

court to exercise its supplemental jurisdiction to hear this claim and resist the motion for summary judgment.

To succeed on an intentional infliction of emotional distress claim, the plaintiffs must prove that (1) the defendants' conduct was outrageous; (2) the defendants intentionally caused, or had reckless disregard for the probability of causing, emotional distress; (3) the plaintiffs suffered severe or extreme emotional distress; and (4) the defendants' outrageous conduct actually and proximately caused plaintiffs' emotional distress. *Vinson v. Linn-Mar Community Sch. Dist.*, 360 N.W.2d 108, 118 (Iowa 1984).

The summary judgment record before the court, viewed in a light most favorable to the plaintiffs, fails to establish liability on these claims of outrageous conduct. The conduct was the firing of Ronald White by Moulder and the City, as well as the belated delivery to White of favorable evidence by Foster and Noel. This conduct was not "so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Harsha v. State Savings Bank*, 346 N.W.2d 791, 801 (Iowa 1984) (quoting *Restatement (Second) of Torts* section 46, comment d (1965)).

Defendants Moulder, Foster, Noel, and city of Des Moines are entitled to summary judgment on counts 5 and 6.

II. Motion to Reconsider/Motion to Amend: Plaintiffs ask this court to reconsider its earlier ruling for summary judgment and their motion to amend their complaint in light of the United State Supreme Court's

November 1992 denial of certioriri [sic] in the case of *Buckey v. County of Los Angeles*, 957 F.2d 652, *as amended*, 968 F.2d 791 (9th Cir. 1992), *cert. denied sub nom, City of Manhattan Beach v. Buckey*, No. 92-560, 61 U.S.L.W. 3287 and *Children's Institute Internat'l v. Buckey (Peggy McMartin)*, No. 92-628, 61 U.S.L.W. 3314 (U.S. Nov. 30, 1992). In *Buckey v. County of Los Angeles*, the plaintiff Buckey sued several defendants after she was acquitted in a highly publicized child molestation case. She contended that "but for the policies and actions of the defendants, her life would not have been ruined by the McMartin Preschool prosecution." *Buckey*, 968 F.2d at 791. The district court dismissed Buckey's complaint for failure to state a claim, denied leave to amend the complaint, and dismissed the pendent state law claims without prejudice. The Court of Appeals for the Ninth Circuit reversed and remanded to the district court to allow Buckey to amend her pleadings:

> We believe one such claim may exist. It is that all the parties described in the complaint conspired under the color of state law to subject Buckey to the hardships and injuries which she suffered. We express no opinion on whether such a claim ethically and professionally can be filed. We only indicate that it is a possibility.
>
> This putative claim would not be addressed to a deprivation under color of state law of procedural due process, but rather would assert that due process was unconstitutionally denied "regardless of the purity of the procedures themselves." [citation omitted] * * * .
>
> Under the putative claim, Buckey, * * * , would assert that the defendants, for their various reasons, conspired to attempt to send her to jail for child molestation, in the course of which great injury was suffered by her. * * * [T]he

> claim would be that the procedures that ultimately established Buckey's innocence were made necessary only because of a wrongful conspiracy of entities and persons acting under the color of state law. The focus would be on a denial of equal protection of the laws * * * .

Id. at 794-95.

By their motion to amend, plaintiffs seek to allege the type of claim enunciated by the Ninth Circuit in *Buckey*.

A. Prior Ruling. Nothing offered by the plaintiffs in their supplemental brief or their motion to amend affects the court's analysis of plaintiffs' allegations contained in counts 1, 5, 6, and 7. The proffered amendment stands by itself and, though not so titled, would add a count 8. Consequently, the court reaffirms its earlier rulings of summary judgment in favor of defendants Polk County and James Ramey on counts 1, 5, 6, and 7.

B. Motion to Amend. Eleven months after the filing of plaintiffs' complaint, plaintiffs seek to amend their complaint to add another theory of liability. In support of their motion to amend, plaintiffs' claim that "[i]t was not apparent at the time the Original Petition was filed that this claim would need to be asserted against Defendants to obtain the relief requested." Motion For Leave to Amend, paragraph 2. In their proposed amendment, plaintiffs contend defendants Moulder, Foster, Noel – all in their official capacities, James Ramey in his individual capacity, and defendant Polk County conspired to deny plaintiff Ronald White equal protection by "requiring Plaintiff to defend himself on criminal theft charges, knowing that exculpatory evidence was wrongfully being

withheld from the trial court, Plaintiff's counsel, and Plaintiff." Amendment, paragraph 5.

A party's motion to amend its pleadings is governed by Federal Rule of Civil Procedure 15(a), which states that leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). But "[t]he policy favoring liberal allowance of amendment does not mean that the right to amend is absolute." *Thompson-El v. Jones*, 876 F.2d 66, 67 (8th Cir. 1989).

> Leave to amend can be properly denied for several reasons, such as undue delay, bad faith or dilatory motive by the movant, undue prejudice to the opposing party, and futility of amendment.

Perkins v. Spivey, 911 F.2d 22, 34 (8th Cir.1990) (citations omitted).

Justice does not require that plaintiffs be allowed to amend their complaint. To allow the amendment of the complaint would be futile. Plaintiffs' proposed amendment alleges the existence of an agreement to withhold exculpatory evidence, i.e. a conspiracy, between defendants Moulder, Foster, Noel, Ramey, and Polk County. But the summary judgment record establishes that Foster and Noel immediately informed Ramey of the evidentiary discrepancies and Moulder was not informed of the discrepancies. There is absolutely no evidence that the defendants had a "mutual understanding" or a "meeting of the minds" concerning the evidentiary discrepancies. *See Smith v. Bacon*, 699 F.2d 434, 436 (8th Cir. 1983).

The proposed amendment is offered 11 months after the filing of the complaint and after two defendants have

been granted summary judgment and the remaining defendants have moved for summary judgment. Plaintiffs' explanation for this delayed amendment – that "it was not apparent" they needed to allege conspiracy when they filed this action in January 1992 – does not persuasively counter the undue delay. Moreover, plaintiffs seek amendment in light of the United State [sic] Supreme Court's November 1992 denial of certiori [sic] in the *Buckey* case. The *Buckey* case was decided by the Court of Appeals for the Ninth Circuit in February 1992 and was available as non-binding authority one month after the complaint was filed. The United States Supreme Court's denial of certiori [sic] may add some weight to its citation in this circuit. Nonetheless, the theory recognized in the *Buckey* case is not tenable of the facts pleaded by plaintiffs.

The motion to amend plaintiffs' complaint is denied.

Conclusion: Defendants' motion for summary judgment on all remaining counts is granted. Plaintiffs' motion to reconsider is denied. Plaintiffs' motion to amend their complaint is denied.

The clerk of court shall enter judgment in favor of defendants and against plaintiffs, with costs taxed to the plaintiffs.

IT IS SO ORDERED.

Dated this 16th day of January, 1993.

/s/ Charles R. Wolle
CHARLES R. WOLLE, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 93-1307SIDM

Ronald White, et al.,	*	
	*	Order Denying
Appellants.	*	Petition for
	*	Rehearing and
vs.	*	Suggestion for
	*	Rehearing
Williama Moulder, et al.,	*	En Banc
	*	
Appellees.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 19, 1994

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit